Filed 8/2/19 In re L.A. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

In re L.A. et al., Persons Coming Under the Juvenile Court Law.	C088293
PLACER COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. B.A., Defendant and Appellant.	(Super. Ct. Nos. 53004713, 53004714)

B.A., father of B.A., Jr., and L.A. (minors), appeals from the juvenile court's order denying his petition to change the court's order terminating his reunification services. (Welf. & Inst. Code, §§ 388, 395; further unspecified statutory references are to this code.) We affirm the juvenile court's order.

FACTS AND LEGAL PROCEEDINGS

Because father raises a single claim on appeal, the summary is limited to facts and procedure relevant to that issue. (Mother is not a party to this appeal and will be mentioned only when relevant to the issues raised by father.)

This family came to the attention of the Placer County Department of Health and Human Services (Department) on August 15, 2017, following a referral regarding an argument between father and mother (then nine-months pregnant with the younger minor, B.A., Jr.), during which father smashed a fan against the wall and threw a garbage can that contained glass which broke and cut mother's leg. Father also grabbed mother and slapped her on the back and on the buttocks. L.A. was present during the argument and could have been hit by debris. Father was arrested and a criminal protective order (CPO) issued. Mother agreed to a safety plan. Thereafter, father twice violated the CPO.

Mother gave birth to minor B.A., Jr., who tested positive for THC. Mother had also tested positive for amphetamines and THC two weeks prior to the minor's birth.

On October 2, 2017, the Department filed a protective custody warrant concurrent with a dependency petition pursuant to section 300 on behalf of 16-month old L.A. and newborn B.A., Jr., alleging serious physical harm to L.A. based on the August 15, 2017, domestic violence incident between the parents (§ 300, subd. (a)); failure to protect L.A. based on the August 15, 2017, domestic violence incident, father's subsequent violations of the CPO, and mother's failure to disclose father's whereabouts to law enforcement officers (§ 300, subd. (b)); failure to protect B.A., Jr., due to mother's substance abuse issues (§ 300, subd. (b)); and serious emotional damage to L.A. due to the parents' previously-alleged conduct (§ 300, subd. (c)). The minors were not detained at that time, but were subsequently temporarily placed in the home of the maternal uncle.

At the detention hearing on October 4, 2017, the court explained to the parents that, because both minors were under the age of three, upon removal of the minors at the

disposition hearing, the parents would have six months to reunify. The court added, "That means you have got to complete the plan laid out for you or be close to completing it. If you are close to completing it or working really diligently on it, we can continue it for another six months. If you are not and you haven't made substantial progress at that six-month date, reunification services are terminated and then we move to selecting a permanent plan." The court also encouraged both parents to attend the parent orientation program. Father's counsel stated, "We certainly have dad's attention. He intends to cooperate fully with the Department. He will get involved with services right away, include [*sic*] testing. We do want visits set up, and as soon as he is testing and testing clean, we would like discretion for relative supervision at this point." The court found father to be the presumed father, ordered the minors detained, and ordered that father have supervised visits twice a week after completion of drug testing.

On October 17, 2017, the court authorized a new placement for the minors with a nonrelative extended family member (NREFM). The court was informed that father was testing clean.

As of November 7, 2017, both parents were homeless. Father was interviewed by the Department's investigator. He denied L.A. was in the room during the August 15, 2017, domestic violence incident, but acknowledged the minor had seen and heard everything. Father also denied throwing the garbage can at mother and stated he was unsure how mother's leg was cut. As for the impact on L.A., father said, "He [L.A.] was upset and crying. It was probably because I was yelling and like I told [mother] and everybody I talk to, I know what I did wrong but I would never do anything to hurt my kids."

Both minors were reportedly doing well in their foster home. L.A. struggled somewhat with listening, maintaining appropriate boundaries, being aggressive with B.A., Jr., and throwing tantrums, but was responding to assistance from the foster parents

in that regard. There were no concerns regarding the infant minor, B.A., Jr., who was starting to recognize the foster parents and smile.

The Department made "many efforts . . . to engage the parents in visitation, drug testing, and biopsychosocial assessments" since the minors were detained, but the parents' efforts to engage had been "inconsistent" and minimal. Father had not engaged in any services beyond meeting probation requirements and drug testing. He had only visited the minors twice since October 2, 2017, and had missed four visits. Father did, however, interact well with the minors when he did visit, and redirected L.A. when necessary.

Jurisdiction/Disposition Hearing

At the November 15, 2017, jurisdiction/disposition hearing, the Department informed the court that neither parent had contacted the social worker since October 12, 2017, despite having been instructed to do so, and stated the social worker wanted to engage the parents in the process of developing services but was unable to. The Department reiterated the importance that the parents "get going on their services and get testing."

The court instructed both parents to attend parent orientation, noting the parents had "wasted an incredible amount of time, shockingly" and had set themselves back by "not getting anything done." The court added, "I just want to tell parents, you have to get on this. It is really bad. You've had a couple weeks off." Finally, the court reminded the parents, "Once we get to disposition, you have six months to reunify. Six months. You have no time to waste. You should be, again, further along. Let's hope we can start again and get moving."

Continued Jurisdiction/Disposition Hearing

At the continued jurisdiction hearing on November 29, 2017, both parents submitted to jurisdiction and disposition based on the Department's reports. The court

sustained the allegations in the dependency petition. The Department reported that neither parent had engaged in any services and father had visited the minors only once. Father's counsel stated father intended to begin the 52-week batterer's treatment program and complete his Alcohol and Other Drug (AOD) assessment that day, to continue to test, and to begin therapy, parenting classes, and Al-Anon co-dependency group "a little bit later as they get going." The court admonished father that "[t]ime is running" and it was imperative to "get on things at this point," and again stressed to both parents the importance of getting involved in services immediately. The court reiterated that, while the "first choice in dependency court is always to return children to their parents," that cannot occur if parents have not participated in services and, after six months, the focus turns to permanency.

The court adjudged the minors dependents of the court, continued their out-of-home placement, adopted the parents' reunification plan, and ordered a minimum of two supervised visits per week.

Status Review Report and Hearing

The status review report filed February 14, 2018, stated the parents had participated in three child and family team (CFT) meetings since October 12, 2017. The parents both identified the paternal grandmother and paternal aunt, both of whom lived in Oregon, as potential caregivers. Father stated he wanted to move to Oregon to be close to his family and his support network and would attempt to meet with his probation officer to have his criminal matter transferred to Oregon.

Father had, since the November 29, 2017, disposition hearing, tested only once (on December 11, 2017), participated in only one batterer's treatment program class, and failed to participate in an AOD assessment. Father blamed his failure to participate on his full-time job, unreliable transportation, and homelessness. Since the disposition

hearing, father had missed three visits in December 2017 and three more visits in January 2018. As a result, visitation was suspended but later reinstated on February 12, 2018.

At the February 14, 2018 hearing, father's counsel stated father was in agreement with the Department's request to place the minors with father's relatives in Oregon, noting father "has a lot more, you know, support up there and things aren't working so great down here." Father's counsel also stated, "Again, I think Father just really needs to engage in the services." The court ordered the Interstate Compact for the Placement of Children (ICPC) to Oregon for possible placement with the paternal great-grandmother and paternal great-aunt.

Six-Month Review Report

The six-month status review report stated father moved to Oregon and had been living with the paternal great-grandmother and paternal great-aunt since mid-February 2018, a move which was "prompted by an intervention from the paternal grandmother, great-grandmother, and aunt," and attended by the social worker. Once in Oregon, father began to participate in services, including an AOD assessment, outpatient drug treatment, and drug testing, and worked as a handyman for the paternal grandfather. However, he returned to California in mid-March 2018, where he reunited with mother, twice tested positive for methamphetamine and amphetamine, and broke mother's cellular telephone. Since his return to Oregon in April 2018, father had not participated in any services with the exception of random drug testing. When asked whether he would be resuming his relationship with mother, father stated, " 'I don't know if that is possible. Things happened in our relationship. I just want my boys back and do whatever I can' to make that happen."

The Department stated that, while father had begun to make progress on his court-ordered case plan once he separated from mother and moved to Oregon in mid-February 2018, within a month he reunited with mother, tested positive for illegal drugs, failed to

participate in services, and re-engaged in domestic violence. He visited the minors only 11 of 23 scheduled visits. The Department concluded that while father "has demonstrated the ability to be an appropriate parent to the children, and he has the insight and potential to make the necessary changes so that his children could be returned to his care," his recent behaviors demonstrated he continued to struggle with understanding how his relationship with mother "significantly impacts the safety and well-being of the children." The Department recommended that father's reunification services be terminated and a section 366.26 hearing set to develop an appropriate permanent plan for the minors. It was also recommended that father's visitation be reduced to once monthly, supervised by the Department.

ICPC

At the June 5, 2018, six-month review hearing, father testified he did not start using methamphetamine until December 2017 and he stopped his daily use of the drug in early January 2018. He denied using drugs after January 2018, claiming his positive drug test in March 2018 was the result of being given illegal drugs without his knowledge. Father participated in one class in his 52-week batterer's treatment program (which was required by the terms of his criminal probation in California), started a drug and alcohol class in Oregon in February 2018, drug tested, and completed an AOD assessment. He admitted he could have participated telephonically in the domestic violence class but had not taken any of the steps necessary to do so. Father also testified he visited the minors whenever he returned to Placer County.

Father admitted his relationship with mother was "[v]ery unhealthy" but testified the relationship was "completely done" and he intended to remain in Oregon where his support system was and get back into services, drug test, get a job, and participate in individual therapy. He stated, however, that he would lose that support and "lose everything" if he started to get off-track. Father testified his last contact with mother was

just after the May 23, 2018, court hearing, when they exchanged "quite a few" texts. When asked why he violated the restraining order, he stated he wanted to be home with his kids.

Social worker Keith Rivera, who worked directly with father on the case and previously recommended termination of father's services, testified he would now recommend additional services after hearing father's testimony. He based his new recommendation largely on his opinion that, when father was apart from mother (namely from March 2018 to April 2018), he was engaged and "doing everything he needed to do." Rivera testified that father visited the minors once in April 2018 and again a week prior to the hearing. He stated there were no concerns regarding visitation; rather, "[i]t's a matter of dad not participating in his case plan which has hindered him from moving forward."

The court noted father failed to participate in services until February 2018, long after the court admonished him to do so in October 2017. The court found the Department offered father "[m]ore than reasonable services" which father wasted during the first three months and was "just now starting" to utilize. The court also found father's testimony that someone unknowingly gave him methamphetamine was "completely not credible." The court noted there had been very few visits at the beginning of the case, and very limited visits since father moved to Oregon, which "was a choice he made."

Finding father failed to take advantage of the reasonable services provided, only minimally participated, and failed to maintain regular visitation, the court concluded there was a substantial risk of detriment if the minors were returned to father, terminated father's services, continued telephone and video visits with the minors, and set the matter for a section 366.26 hearing.

Section 366.26 Report

As of September 13, 2018, father had attended less than half of the 28 scheduled visits with the minors, and his last in-person visit was on June 6, 2018. The Department recommended termination of father's parental rights.

Father's Section 388 Petition

On September 25, 2018, father filed a section 388 petition seeking to change the court's order terminating his reunification services. The petition alleged father had, since termination of services, remained clean and sober and continued to participate in services on his own, including domestic violence class, drug testing, and outpatient treatment, and was working full-time and visiting the minors via video calls. Father requested that the court either return the minors to him, reinstate his services and allow unsupervised visits, or place the minors with relatives in Oregon. He argued the requested changes would be in the minors' best interests because "Father has not given up and is ready to be a father to his 2 sons. Having the children with paternal relatives in Oregon would allow them to have a father, the only parent who remains clean and involved in their lives. The boys deserve to have a healthy parent who wants them in their lives. They also have 2 siblings in Oregon they would be able to grow up with."

Combined Contested Section 366.26 and Section 388 Hearing

At the combined section 366.26 and section 388 hearing on October 23, 2018, father testified he was still on probation in Oregon, was drug testing, had attended 14 weeks of a 36-week domestic violence program in Oregon, completed a drug treatment program, and had been drug-free since April 2018. He stated he did not have a drug or alcohol problem prior to meeting mother in February 2015 and claimed he began using drugs after the minors were removed. Father's counsel made an offer of proof regarding clean tests in May, June, July, August, and September.

Father further testified he had been employed since July 2018 working construction. He enrolled in a parenting class and completed two or three classes. He had not yet learned what to look for in a significant other who will be around the minors, but he learned in his domestic violence classes to look for red flags. He felt mother was "controlling." He learned about the warning signs of someone being controlling in his domestic violence class but could not list any of the signs. Father had concerns about mother's parenting but "couldn't talk to her about anything." He testified he was "completely done" with mother and would block her calls if she tried to contact him.

Social worker Julie Clavin testified that L.A. was very comfortable and secure in his foster home and had a good attachment to his foster parents. L.A.'s initial behaviors of banging his head, not talking, listening, or taking directions well, and being aggressive towards B.A., Jr., were either decreased or nonexistent. L.A. looked to his foster parents as his primary caretakers, referring to them as "mommy" and "daddy." B.A., Jr., had a very close and significant bond with the foster mom and reacted by crying and screaming when separated from her. B.A., Jr., also looked to his foster parents as his primary caretakers.

Clavin testified she observed video visits between father and the minors. She stated father had four in-person visits with the minors—in April, May, June, and September—and had consistent weekly video visits during which he acted appropriately. Clavin opined that any transitioning of B.A., Jr., to his relatives in Oregon "may have some harmful events for him" because B.A., Jr., had no relationship with those relatives. Clavin did not believe it was in B.A., Jr.,'s best interest to attempt to transition him to Oregon because B.A., Jr., had resided with his current caregivers his entire life and had a long-term attachment or bond. Clavin also stated it would not be in L.A.'s best interest to change his placement to Oregon because L.A. had been with his current caregivers for a year, almost half of his life, and while such a transition would be less difficult for him than for his younger brother, Clavin stated it would not be a good idea to separate the two

siblings for any reason. When asked what would be the harm if father were given additional reunification services, Clavin stated it would delay permanency for the minors, who needed to continue to have a stable and secure home.

After taking the matter of the section 388 petition under submission, the court concluded father had not met his burden to demonstrate either changed circumstances or best interests of the minors under section 388. The court denied father's section 388 petition, terminated parental rights, and identified adoption as the permanent plan.

Father filed a timely notice of appeal.

DISCUSSION

Father contends the juvenile court abused its discretion in denying his section 388 petition seeking renewed reunification services. He claims there was sufficent evidence of changed circumstances and that the requested change would be in the minors' best interests.

"To prevail on a section 388 petition, the moving party must establish that (1) new evidence or changed circumstances exist, and (2) the proposed change would promote the best interests of the child. [Citation.]" (*In re J.T.* (2014) 228 Cal.App.4th 953, 965.) The change of circumstances or new evidence "must be of such significant nature that it requires a setting aside or modification of the challenged prior order." (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485; see also *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451.)

When reunification services have been terminated and a section 366.26 hearing has already been set, a court assessing the child's best interests must recognize that the focus of the case has shifted from the parents' interest in the care, custody, and companionship of the child to the needs of the child for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) The child's best interests "are not to further

delay permanency and stability in favor of rewarding" the parent for his or her "hard work and efforts to reunify." (*In re J.C.* (2014) 226 Cal.App.4th 503, 527.)

"A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

The petitioner bringing a section 388 petition has the burden of proof on both points by a preponderance of the evidence. (Cal. Rules of Court, rule 5.570(h)(1)(D).) In assessing the petition, the court may consider the entire history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.) We review for abuse of discretion a juvenile court's denial of a section 388 petition (*In re J.T., supra*, 228 Cal.App.4th at p. 965), reversing only if under all the evidence, including reasonable inferences from the evidence and viewed most favorably to the ruling, no reasonable judge could have made that ruling. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) If there is a conflict in the evidence, we reverse only if the evidence compels a finding for the appellant as a matter of law. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

As we explain, the juvenile court did not abuse its discretion in denying father's section 388 petition.

A. Changed Circumstances

At the six-month review hearing in June 2018, the court found father had only been participating in services since February 2018, despite repeated admonishments that he do so since October 2017. Father was drug testing; however, he tested positive for methamphetamine in March 2018 and testified it was the result of having been given illegal drugs without his knowledge, a claim the court found to be "completely not credible." His participation in services was still lacking, given that he had not

participated in domestic violence classes (a key issue in the removal of the minors), had not begun to take parenting classes, and had only just begun to participate in AOD classes. His visitation with the minors was minimal prior to the move to Oregon, and limited thereafter. Based on father's minimal participation in and continued failure to take advantage of services provided to him, and his failure to maintain regular visitation, the court found there was a substantial risk of detriment if the minors were returned to father and terminated his services.

Father's section 388 petition argued that, since termination of his services, circumstances had changed because he was clean and sober, had participated in services including domestic violence class, drug testing, and outpatient treatment, was working full-time, and had been visiting the minors via video calls. In support of those claims, father testified on October 23, 2018, that he was drug testing, had completed a drug treatment program and been drug-free since April 2018, had attended 14 weeks of a 36-week domestic violence program, had been employed since July 2018, and had enrolled in a parenting class and completed two or three classes. Father also testified he only began using drugs when the minors were removed in August 2017. Finally, father testified he was "completely done" with mother and would block mother's calls if she tried to contact him.

The juvenile court found the circumstances did not amount to changed circumstances but rather changing circumstances. We agree. Father's visitation was inconsistent before termination of services and somewhat so thereafter. As of September 13, 2018, father had attended less than half of the 28 scheduled visits with the minors. Since choosing to move to Oregon, father had only four in-person visits (one in April, one in May, one in June, and one on September 26, 2018) and seven video visits with the minors. All of the visits were supervised and father never progressed to unsupervised visitation. While it was father's decision to move to Oregon to be closer to his family and support system, that decision negatively impacted his ability to have

consistent in-person visits with the minors, and thus to develop a closer relationship and bond with them.

Further, father's participation in services was abysmal prior to termination of those services in June 2018. While his participation improved thereafter, the evidence demonstrated the circumstances were, at best, changing. For example, the initial reason for removal of the minors was domestic violence between father and mother. As such, one of the key components of father's case plan was participation in a 52-week batterer's intervention program, along with individual therapy, parenting education classes, drug testing, participation in Al-Anon, and completion of an AOD assessment. However, as of the section 366.26 hearing on October 23, 2018, father had completed less than half of a 36-week domestic violence program and had attended just two or three parenting classes. Father was drug testing regularly and had completed a drug treatment program, but had only been drug-free since his relapse in April 2018. While father was finally beginning to engage in services, he had yet to progress enough to demonstrate changed circumstances.

Father argues the Department was "required" to provide reasonable services "which would include helping with the costs of travel" to ensure adequate visitation with the minors in California. Father cites no authority, and we are unaware of any, that would have compelled the Department to provide father, who voluntarily moved a significant distance away from the minors, with money or other resources to accommodate travel between Oregon and California to visit the minors on a consistent basis.

We reject father's claim that the court required him to "actually complete services in order to prove a change of circumstances." On the contrary, the court admonished father at the October 2017 detention hearing that if he had not made substantial progress at that six-month date, reunification services would be terminated.

We also reject father's self-serving, misleading characterization of the facts when he argues he "had only had six months of reunification services," had completed five months on his own by the time of the section 366.26 hearing, and "was eligible for six months more" pursuant to sections 366.21 and 366.22. Services began in October 2017. By the time of the six-month review hearing in June 2018, father had already received eight months of services, the first three of which he wasted by failing to participate at all. Because both minors were under the age of three, father was entitled to only six months of services pursuant to section 361.5, subdivision (a)(1)(B). He might have been entitled to an additional period of services pursuant to section 361.5 and section 366.21 had he demonstrated at the six-month review hearing that he made substantive progress in his court-ordered treatment plan. As discussed at length above, he failed to do so.

Substantial evidence supported the juvenile court's finding that father's circumstances, though changing, had not changed sufficiently to satisfy section 388. (See *In re Casey D., supra*, 70 Cal.App.4th at p. 47.)

B. Best Interests of the Minors

Even assuming father had shown changed circumstances, he did not show it would be in the minors' best interests to reinstate his reunification services.

Father's section 388 petition alleged the requested changes would be in the minors' best interests because he had not given up on the minors and was ready to be a father to them; there were paternal relatives in Oregon with whom the minors could be placed so as to allow them contact with father, "the only parent who remains clean and involved in their lives;" the minors "deserve[d] to have a healthy parent who wants them in their lives;" and the minors had two siblings in Oregon.

Once reunification services are ordered terminated, the focus shifts to the needs of the minor for permanency and stability. The parent's interest in having an opportunity to reunify with the minor is balanced against the minor's need for a stable, permanent home.

(*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Father was repeatedly admonished by the court to get engaged in services before it was too late. He finally did participate in some services and made some changes, but there were still some issues (namely, domestic violence, substance abuse, and father's lingering relationship with mother) that caused serious concern as to whether father could safely and properly care for and protect the minors. Father had significant work ahead of him in order to complete the services and eliminate any actual or potential risk of harm to the minors. On the other hand, the minors were adoptable and had spent the past year with their foster parents, with whom they felt safe and were happy. As social worker Clavin testified, given the minors' close bond and extended time spent with their foster parents, it was not in the minors' best interests to remove them from the stability of their current placement and move them to a new environment with relative strangers in Oregon. Reinstating father's reunification services at that point would, at best, delay permanence and stability for the minors and, at worst, have the potential to cause the minors needless emotional stress and harm.

Father acknowledges the presumption that stability in an existing placement is in the best interest of the minor once reunification services have been terminated (*In re Angel B.* (2002) 97 Cal.App.4th 454, 465), but argues the ideal situation is for the minors to be raised by their parents, if possible. We are not persuaded that was possible here, where father made some progress but had much progress to achieve before a determination could be made that the minors would be safe, secure, and well cared for in father's custody.

The juvenile court's ruling was a proper exercise of discretion.

DISPOSITION

The juvenile court's order denying father's section 388 petition is affirmed.

HULL, Acting P. J.

We concur:

BUTZ, J.

HOCH, J.